PPEC (M) Sdn Bhd v REPC Services Sdn Bhd (previously known as Ranhill Engineers and Construction Sdn Bhd) and another suit

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS 22C-64–11 OF 2014 AND 22C-67–11 OF 2014
MARY LIM J
29 APRIL 2015

Civil Procedure — Affidavit — Defective affidavit — Only copy of affidavit served on defendants without required endorsement — Lack of endorsement properly accounted for as act of inadvertence — Whether defendants prejudiced — Affidavit allowed to be used

Civil Procedure — Pleading — Material facts — Duress — Whether plea of duress sufficiently pleaded — Rules of Court 2012 O 18 r 12

Civil Procedure — Striking out — Application for — Application to strike out writ and statement of claim — Claim for works done under building contract — Settlement agreement executed and settlement sums duly paid — Whether settlement agreement executed under duress and threats — Proceedings to set aside settlement agreement and claim balance sums — Whether no reasonable cause of action disclosed — Whether claim frivolous, vexatious, scandalous and abuse of process of court — Whether plain and obvious case to be struck out — Whether plaintiffs' claims bound to fail or obviously unsustainable — Whether plaintiffs' claim fact driven and viva voce evidence required — Rules of Court 2012 O 18 r 19(1)(a), (b) & (d)

Contract — Building contract — Claim for works done — Settlement agreement executed and settlement sums duly paid — Whether settlement agreement executed under duress and threats — Whether settlement agreement could be set aside and balance sums claimed

The two plaintiffs were awarded several works contracts relating to the construction of the Senai—Pasir Gudang—Desaru Expressway by the defendants. The plaintiffs claimed that they had completed all the works and statements of final accounts had been issued for all the subcontract works. The plaintiffs respectively claimed the sums of RM6,905,525.71 and RM1,317,902.57 from the defendants in relation to the completed works. The common director of the two plaintiffs, one Dato Petrus, had met with Tan Sri

Hamdan, the general manager of both defendants on 23 May 2014 to discuss the payment of outstanding sums. According to Dato Petrus, he was forced by Tan Sri Hamdan to sign a settlement contract and accept a sum of RM1.5m as full and final settlement of the outstanding sums. Dato Petrus claimed that he had signed the settlement contract under duress due to threats by Tan Sri Hamdan. Dato Petrus made a police report on the incident, claiming that he was worried about the payment of the substantial balance sums and that he was worried about his safety and that of his family and the plaintiffs. The plaintiffs brought the present suit claiming for the balance of the outstanding sums. The defendants denied the plaintiffs' allegations and filed applications to strike out the plaintiffs' claims under O 18 r 19(1)(a), (b), and/or (d) of the Rules of Court 2012 on the grounds that the claims did not disclose any reasonable causes of action since Dato Petrus has signed the settlement contract. The defendants also contended that the claims were frivolous, vexatious and scandalous; and abuse of the process of court. The defendants further contended that one of the affidavit filed by the plaintiffs was defective as only the copy of the affidavit was served on the defendants and that it did not bear the required endorsement. The copy of the affidavit filed and with the court was proper.

Held, dismissing the both applications with costs in the cause:

(1) The court allowed the reliance on the affidavit as the lack of endorsement had been properly and adequately accounted for as a simple act of inadvertence. The defendants were not in any way prejudiced nor did the defendants face any difficulty by this oversight (see para 13).

(2) This was not an appropriate case for striking out. The principles as set down in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 had not been met. The two cases were not plain and obvious cases to be struck out. The pleadings in both cases evinced reasonable causes of action, the success, strength or otherwise was not of concern at this point in time. It could not be said with near absolute certainty that the plaintiffs' claims were bound to fail or were obviously unsustainable (see paras 14–15).

(3) The central and critical issue of the validity of the settlement contract, whether it was in fact vitiated by duress including economic duress or a lack of free will as claimed by the respective plaintiffs, was a valid, real and genuine issue. The cause of action was in contract and in order to vitiate and nullify, if at all, any or all the contents of that settlement contract, the circumstances surrounding and leading to the signing of that contract as well as the post conduct of the parties, would be highly relevant. Those facts and circumstances were heavily disputed. What exactly transpired needed to be established; and that required findings of fact especially

from the individuals involved. The very issues that platformed the plaintiffs' claims were necessarily fact driven and viva voce evidence was thereby required (see paras 18–19).

(4) At this summary stage, the court could not say that the plaintiffs' two cases were clearly and obviously unsustainable; that both cases were vexatious, frivolous or scandalous; or that both cases abused the process of court. In such circumstances, the two cases should proceed to trial (see para 20).

(5) The plea of duress was sufficient and within the requirements of O 18 r 12 of the Rules of Court 2012. There were sufficient details and particularisation of this allegation for the defendants to attend to the claim (see para 21).

[Bahasa Malaysia summary

Kedua-dua plaintif telah diawardkan beberapa kontrak kerja bagi pembinaan Lebuhraya Senai—Pasir Gudang—Desaru oleh defendan. Plaintif mendakwa bahawa mereka telah menyiapkan kesemua kerja-kerja dan penyata akaun muktamad telah dikeluarkan bagi kesemua kerja-kerja subkontrak. Plaintif-plaintif, masing-masing menuntut jumlah wang sebanyak RM6,905,525.71 dan RM1,317,902.57 daripada defendan-defendan berhubung kerja-kerja yang telah disempurnakan. Pengarah bersama kedua-dua plaintif, Dato Petrus, telah bertemu dengan Tan Sri Hamdan, pengurus besar kedua-dua defendan pada 23 Mei 2014 untuk berbincang mengenai pembayaran jumlah wang yang tertunggak. Menurut Dato Petrus, dia telah dipaksa oleh Tan Sri Hamdan untuk menandatangani kontrak penyelesaian dan menerima RM1.5 juta sebagai penyelesaian penuh dan terakhir wang tertunggak. Dato Petrus mendakwa bahawa dia telah menandatangani kontrak penyelesaian secara terpaksa berikutan ancaman oleh Tan Sri Hamdan. Dato Petrus membuat laporan polis mengenai kejadian itu, dengan mendakwa bahawa dia bimbang mengenai pembayaran jumlah wang yang besar dan bahawa dia bimbang tentang keselamatan dirinya dan keluarganya serta plaintif-plaintif. Plaintif-plaintif mengemukakan guaman ini bagi menuntut baki jumlah wang yang tertunggak. Defendan-defendan menafikan dakwaan-dakwaan plaintif-plaintif dan memfailkan permohonan-permohonan untuk membatalkan tuntutan-tuntutan plaintif di bawah A 18 k 19 (1) (a), (b) dan/atau (d) Kaedah-Kaedah Mahkamah 2012 atas alasan bahawa tuntutan tidak mendedahkan apa-apa kausa tindakan munasabah kerana Dato Petrus telah menandatangani kontrak penyelesaian. Defendan-defendan juga menyatakan bahawa dakwaan-dakwaan adalah remeh, menyusahkan dan bersifat skandal; dan merupakan satu salah guna proses mahkamah. Defendan juga menegaskan bahawa salah satu afidavit yang difailkan oleh plaintif adalah cacat kerana hanya salinan afidavit itu telah disampaikan kepada defendan-defendan dan ia tidak mengandungi

pengendorsan yang dikehendaki. Salinan afidavit yang difailkan di mahkamah itu adalah betul.

Diputuskan, menolak kedua-dua permohonan dengan kos dalam kausa:

(1) Mahkamah membenarkan pergantungan kepada afidavit kerana kekurangan sokongan telah, dengan wajar dan secukupnya diambil kira sebagai satu tindakan tidak sengaja yang mudah. Defendan tidak, dalam apa-apa cara, diprejudiskan atau menghadapi apa-apa kesukaran dengan kesilapan ini (lihat perenggan 13).

(2) Ini bukan kes yang sesuai bagi pembatalan. Prinsip-prinsip yang ditetapkan dalam *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 tidak dipenuhi. Kedua-dua kes bukanlah biasa dan bukan kes-kes yang jelas untuk dibatalkan. Pliding-pliding dalam kedua-dua kes membuktikan sebab-sebab munasabah untuk bertindak, berjaya, kekuatan atau sebaliknya bukanlah perkara pokok ketika ini. Ia tidak boleh dikatakan dengan kepastian penuh bahawa tuntutan plaintif-plaintif berkemungkinan gagal ataupun jelas tidak mampan (lihat perenggan 14–15).

(3) Isu utama dan kritikal adalah kesahihan kontrak penyelesaian, sama ada ia sebenarnya dibatalkan oleh dures termasuk dures ekonomi atau ketiadaan kehendak bebas seperti yang didakwa oleh plaintif-plaintif, merupakan satu isu yang sah, tepat dan tulen. Kausa tindakan adalah dalam kontrak dan untuk menjadikan ia tidak sah dan membatalkan, jika boleh, mana-mana atau kesemua kandungan kontrak penyelesaian, hal-hal keadaan sekeliling dan yang membawa kepada pemeteraian kontrak dan tindakan terkemudian pihak-pihak, akan menjadi sangat relevan. Fakta dan hal keadaan telah banyak dipertikaikan. Apa yang sebenarnya berlaku perlu dibuktikan; dan bahawa penemuan fakta terutamanya daripada individu yang terlibat diperlukan. Isu-isu yang sangat mengetengahkan tuntutan-tuntutan plaintif adalah fakta yang terdorong dan secara *viva voce* bukti yang diperlukan (lihat perenggan 18–19).

(4) Pada peringkat ringkasan ini, mahkamah tidak boleh mengatakan bahawa dua kes plaintif adalah jelas tidak mampan; bahawa kedua-dua kes menyusahkan, remeh atau bersifat skandal; atau bahawa kedua-dua kes menyalahgunakan proses mahkamah. Dalam keadaan sedemikian, kedua-dua kes perlu terus dibicarakan (lihat perenggan 20).

(5) Pli paksaan cukup dan dalam keperluan A 18 k 12 Kaedah-Kaedah Mahkamah 2012. Terdapat butir-butir yang mencukupi dan pemerihalan pertuduhan ini bagi defendan mementuhi tuntutan tersebut (lihat perenggan 21).]]]

Notes

For cases on application for, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8782–8808.

For cases on claim for works done, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3925-3943.

For cases on defective affidavit, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 516–547.

For cases on material facts, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7134–7153.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36, SC (refd)

The Golf Cheque Book Sdn Bhd & Anor v Nilai Springs Bhd [2006] 1 MLJ 554; [2006] 1 CLJ 259, CA (refd)

Legislation referred to

Rules of Court 2012 O 18 r 12, O 18 r 19(1)(a), (b), (d)

Thayakugan Rajendram (Mahakalithas Pramasamy with him) (Azlan MK Thas & Co) for the Civil Suit No 22C-64–11 of 2014 for the plaintiff.

Thayakugan Rajendram (Mahakalithas Pramasamy with him) (Azlan MK Thas & Co) for the Civil Suit No 22C-67–11 of 2014 for the plaintiff.

Ashok Kumar Raman (Rajasurian Ramasamy with him) (Nathan) for the Civil Suit No 22C-64–11 of 2014 for the defendant.

Ashok Kumar Raman (Rajasurian Ramasamy with him) (Nathan) for the Civil Suit No 22C-67–11 of 2014 for the defendant.

Mary Lim J:

[1] These two cases were listed for hearing on the same day. Both learned counsel had agreed that the two cases be heard together, one after another given that there is much in common between them. The essential difference is in the name of the parties but that is not in the least inhibiting as the parties are agreed that the relationship of the parties was governed by the project that the parties were involved in. The parties had used their various subsidiaries to handle or contract for different subcontract works in the same project, that is, the construction and completion of bridge structures along the Senai—Pasir Gudang—Desaru Expressway; as well as other projects. The present two cases however, concern only the Senai—Pasir Gudang—Desaru Expressway project.

[2] In 22C-64-11 of 2014, through different letters of award spread over a course of some four years from 2006 to 2010, PPEC (M) Sdn Bhd, the plaintiff, was awarded several works relating to the construction of the

Senai—Pasir Gudang—Desaru Expressway by REPC Services Sdn Bhd (previously known as Ranhill Engineers And Construction Sdn Bhd), the defendant. Those works relate to the 'preparation of a casting yard for the construction of pre-cast beams of Package 1, 2 and 3C'; 'bridge structure works for Package 1/5, 1/6 & 1/7'; 'sub-grade treatment (HIEDYC) work for 480 mm alternative design pavement for Package 3C/6'; 'Completion of balance earthworks and drainage works from Ch 484000 to Ch 58000'; 'bridge super structure works for additional bridge BR11E & BR11F'; 'rock blasting works'; 'turfing and other associated works'; 'grass cutting works'; and 'supply of plant machinery for unloading and spreading sand at Pulau Juling'. PPEC (M) Sdn Bhd claimed that it had completed all the works and statements of final accounts had been issued for all the subcontract works. A total of RM6,905,525.71 is said to be due and outstanding from all the subcontract works.

[3] In 22C-67–11 of 2014, Petbina Resources Sdn Bhd was awarded a contract by Ranhill Antara Koh Sdn Bhd for 'bridge structure for Package 3C/4 & 3/5 (Works) Senai—Pasir Gudang— Desaru Expressway'. Petbina Resources Sdn Bhd claimed that it had completed all works on 28 February 2011 and a final certificate was issued by Ranhill Antara Koh Sdn Bhd on 14 April 2011. A sum of RM1,317,902.57 was certified as the value of Petbina Resources Sdn Bhd's works.

[4] What happened next is common in the pleas in both cases. On 23 May 2014, the common director of the two plaintiffs, one Dato Petrus JR met with Tan Sri Hamdan Mohamad, the general manager of both defendants at the office of the defendants. The meeting was to discuss the payment of outstanding sums due under several projects including the Senai—Pasir Gudang—Desaru Expressway project. Several officers of the defendants attended that same meeting.

[5] According to the plaintiffs, Dato Petrus JR, had signed a 'full and final settlement for all contract' ('settlement contract') at that meeting. In that settlement contract, Dato Petrus is said to have accepted the sum of RM1,500,000 as 'the full and final settlement of the outstanding due to PPEC (M) Sdn Bhd and all companies relates to the Dato Petrus JR in regards for all contract related to the completion of the Senai—Desaru—Pasir Gudang project'. A Kuwait Finance House cheque for that sum was issued to Dato Petrus. By that settlement contract, the parties are said to have agreed that '[T]here shall be no further claims against REPC Services Sdn Bhd's shareholders/directors/Senai Desaru Expressway Berhad or any other related party to the said project upon clearance of the said cheque'.

[6] Dato Petrus claimed that he had signed the settlement contract under

duress. He claimed that he was threatened by Tan Sri Hamdan Mohamad that if he did not sign the settlement contract, he and the plaintiffs would not receive any payment for all the projects the parties were involved in including the Senai—Desaru—Pasir Gudang project and that they would not get any new projects from the defendants or their related companies. The settlement contract was said to have been pre-prepared and that Dato Petrus had signed it without referring it to the plaintiffs' other directors and without procuring resolutions of the plaintiffs accepting that settlement proposal. The plaintiffs claimed that they had financial hardship at the material time; that funds were needed to keep projects running and that their reputation in the construction industry were at stake. Being concerned over these matters Dato Petrus, without free will, was forced to sign the settlement contract. On 30 May 2014, Dato Petrus made a police report on the incident, claiming that he was worried about the payment of the substantial balance sums and that he was worried about his safety and that of his family and the plaintiffs.

[7] The present claims in both cases are for the outstanding sums with the plaintiff's claiming that the RM1.5m was received as part payment of the outstanding sums.

[8] The claims and the allegations are denied. In response, the defendants claimed that on 23 May 2014, Dato Petrus had met with two officers of the defendants, Izani Ibrahim and Raminder Singh. At that meeting, Dato Petrus who was informed that the defendants wanted to pay the sum of RM1.5m to the plaintiffs as full settlement of all projects and related companies, had expressed interest in meeting with Tan Sri Hamdan Mohamad. Dato Petrus was then brought to meet with Tan Sri Hamdan and at that meeting, the settlement contract was said to have been signed by Dato Petrus, voluntarily and without any protest.

[9] The defendants claimed that the allegations of the plaintiffs are afterthoughts concocted to claim from the defendants what was agreed to have been already fully settled. The defendants also plead estoppel. Specifically, the defendants refer to the plaintiffs' post conduct as indicative of a lack of duress and that the payment of RM1.5m was received voluntarily and without duress. There was no rejection or challenge of the settlement contract at the material time; and that the cheque was encashed two days later without protest; and that the police report was made after the cheque was encashed. The defendants claimed that in fact, it was the plaintiffs who had threatened the defendants through the issuance of a notice under s 218 of the Companies Act 1965. There were no winding up proceedings after the defendants successfully secured an injunction.

[10] In its reply, the plaintiffs detailed that Tan Sri Hamdan Mohamad had

signed a letter of undertaking and/or commitment in the name of Ranhill acknowledging assistance of RM3.5m to the plaintiffs on the same date of the settlement contract; that the sum of RM1.5m was far too low a sum; not reasonable and just as full and final settlement of all the sums due given that the value of the works under the project was over RM10m. The plaintiffs added that Dato Petrus was not given an opportunity to negotiate the settlement and that he was forced to sign the settlement contract which was prepared using Ranhill's letterhead and signed by a Zulkiflee Mohamed Ibrahim, who did not attend the meeting on 23 May 2014.

[11] The respective defendants filed similar applications to strike out the respective claims. The applications found in encl (9) and (11) respectively invoke O 18 r 19(1)(a), (b) and/or (d) of the Rules of Court 2012. In essence, the defendants rely on the new agreement, that is, the settlement contract as full and final global settlement of the sums between them. The two claims are said to run counter to the agreed terms in which case, the claims are said not to have disclosed any reasonable causes of action; are frivolous, vexatious and scandalous; and that the claims are abuses of the process of court. Affidavits and affidavits-in-reply have been exchanged between the parties.

[12] Both learned counsel have made submissions which are to be taken as submissions in respect of both applications in the two cases. There is no need to distinguish any particular fact or matter in relation to any of the two cases as the central issue revolves around the same event or incident.

DETERMINATION

[13] Before going into the determination of the two applications, there was a small matter of an irregularity in the affidavit filed by the plaintiffs; the defendants alleging that it was defective and that the affidavit should be ignored. Upon proper consideration, it was found that it was only the copy of the affidavit served on the defendant that was not proper in that it did not bear the required endorsement. The copy filed and with the court is proper. With leave, the court had allowed the reliance on that affidavit as the lack of endorsement had been properly and adequately accounted for as a simple act of inadvertence. The court did not find the defendants in any way prejudiced nor did the defendants face any difficulty by this oversight and in the interest of justice, the reliance was allowed.

[14] Returning to the two applications, after hearing and considering submissions and affidavits filed and most important upon considering the pleadings filed, the court disagrees that this is an appropriate case for striking out.The court is of the view that the principles as set down in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36 have not

been met. The court does not find any of these two cases to be plain and obvious cases to be struck out.

[15] The court finds that on the contrary, the pleadings in both cases do evince reasonable causes of action, the success, strength or otherwise is not of concern at this point in time and certainly not at these interlocutory proceedings; unless it can even now be said with near absolute certainty that the plaintiffs' claims are bound to fail or are obviously unsustainable. The court cannot say so in all fairness especially after examining the papers before the court.

[16] It is not disputed that the outstanding sums due from the defendants to the plaintiffs at the material time was RM6,905,525.71 and RM1,317,902.57. A total sum of just over RM8m. Yet, the plaintiffs are said to have accepted a sum of RM1.5m as full and final settlement of these and other claims as evinced in the settlement contract.

[17] Despite recognising that there is this settlement contract, the plaintiffs contend that there was in effect no settlement.The plaintiffs claim to have signed the settlement contract and accepted the RM1.5m under conditions and circumstances which it now describes as duress or economic duress. The details of the allegations are as set out above and as found in paras 7 and 8 of the respective statements of claim and from the affidavits filed. The defendants have denied duress and have raised several defences including their version and explanation of what transpired on the material date of 23 May 2014; claims of afterthoughts and estoppel. Learned counsel for the defendants has also urged the court to find that because the plaintiffs have not exhibited the police report and the 'sms' averred to in the affidavits and that there was no attempt even now to make their case, this confirmed the defendants' contention that the claims are really afterthoughts and abuses of the court process.

[18] With respect, the court disagrees. The court finds that the central and critical issue of the validity of the settlement contract, whether it is in fact vitiated by duress including economic duress or a lack of free will as claimed by the respective plaintiffs, is a valid, real and genuine issue.The cause of action is in contract and in order to vitiate and nullify, if at all, any or all the contents of that settlement contract, the circumstances surrounding and leading to the signing of that contract as well as the post conduct of the parties, would be highly relevant. Those facts and circumstances are heavily disputed in the pleadings as well as in the affidavits. Although Izani bin Ibrahim had deposed the affidavits for the defendants denying the plaintiffs' allegations, Dato' Petrus, who is central in these allegations, deposed that Izani bin Ibrahim was not present throughout the negotiations with Tan Sri Hamdan. Hence, what

exactly transpired needs to be established; and that requires findings of fact especially from the individuals involved.

[19] The very issues that platforms the plaintiffs' claims are necessarily fact driven and viva voce evidence is thereby required. It is also noted that the fact that two agreements were signed on the same date with the principal settlement contract supposedly prepared in advance and signed by someone who was not at the crucial meeting also warrants closer examination.

[20] This is not a trial by affidavits and the court should not descend into such a trial— see *The Golf Cheque Book Sdn Bhd & Anor v Nilai Springs Bhd* [2006] 1 MLJ 554; [2006] 1 CLJ 259. The matters alleged including the status of the police reports made also require greater examination. At this summary stage, the court cannot say that the plaintiffs' two cases are clearlyandobviously unsustainable; that both cases are vexatious, frivolous or scandalous; or that both cases abuse the process of court. In such circumstances, the two cases should proceed to trial.

[21] It must be added that the court finds that the plea of duress is sufficient and within the requirements of O 18 r 12 of the Rules of Court 2012. There are sufficient details and particularisation of this allegation for the defendants to attend to the claim. In fact, the defendants have not been in any way incapacitated, encumbered or embarrassed from responding and has in effect, done so ably in their two defences.

[22] Accordingly, both applications are dismissed with costs in the cause.

Both applications dismissed with costs in cause.

Reported by Kanesh Sundrum